In the Supreme Court

OF THE

United States

OCTOBER TERM, 1967

No. 465

ELISHA EDWARDS,
Petitioner,

vs.

PACIFIC FRUIT EXPRESS COMPANY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE PETITIONER

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OPINIONS BELOW

The memorandum order of the United States District Court for the Northern District of California granting summary judgment for respondent, dated March 18, 1966, is unreported and is reproduced on pages 51-52 of the printed Appendix. The opinion of the Court of Appeals for the Ninth Circuit is reported in 378 F.2d 54 and is reproduced on pages 53-54 of the printed Appendix.

JURISDICTION

The judgment of the Court of Appeals was entered on May 10, 1967. Petitioner did not seek a rehearing before that court. On July 28, 1967, by order of Mr. Justice White, the time within which to file a petition for a writ of certiorari was extended to September 1, 1967. The petition was filed on August 7, 1967, and was granted on October 23, 1967. The jurisdiction of this Court rests on 28 U.S.C. §1254 (1).

STATUTE INVOLVED

This case turns upon the construction of Section 1 of the Federal Employers' Liability Act, 53 Stat. 1404, 45 U.S.C. §51, which provides:

> Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or

by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

QUESTION PRESENTED

Is Pacific Fruit Express Company a "common carrier by railroad" and therefore subject to liability under the Federal Employers' Liability Act where:

(a) it owns, controls, operates and services the largest fleet of refrigerated railroad cars and trailers in the United States;

(b) it controls the movement of its cars in transit;

(c) it holds itself out to the public as providing common carriage of perishable commodities by rail;

(d) it owns extensive railroad terminal, service and repair properties and facilities;

(e) it owns railroad tracks and locomotives which it uses in its operations;

(f) it is required to report its financial data to the Interstate Commerce Commission, using a form of accounts prescribed by the I.C.C.;

(g) it is required to maintain its railroad equipment in compliance with the Federal Safety Appliance Act and is subject to the Railway Labor Act, the Railroad Retirement Act, and the Railroad Unemployment Insurance Act;

(h) it charges for the use of its railroad cars on the basis of the *distance* goods are carried in its cars;

(i) its employees are continuously exposed to the identical hazards faced by employees of operating railroads generally; and,

(j) it engages solely in operations having to do with the carriage of goods by railroad?

STATEMENT OF THE CASE

This action arises under the Federal Employers' Liability Act and seeks damages for injuries caused petitioner, Elisha Edwards, while acting in the course of his employment by respondent, Pacific Fruit Express Company (P.F.E.), at Roseville, California. The complaint (A. 1-4) reflects that on November 9, 1963, petitioner was employed by respondent in furtherance of respondent's interstate commerce operations; because of the careless and negligent maintenance of appliances and premises by respondent, petitioner was seriously and permanently injured when he was en-

veloped by burning gasoline; as a result, petitioner is disabled and disfigured and has prayed for general damages in the sum of One Million Dollars in addition to his special damages. Respondent's answer (A. 4-7) admits that it is a Utah corporation acting in interstate commerce; that petitioner was employed by respondent at the time of the accident; that petitioner was injured in the course of his employment;[1] and that it has in fact been necessary for petitioner to receive an as yet undetermined amount of medical care for his injuries. The employment in which petitioner was engaged when he sustained these injuries involved making respondent's railroad freight cars ready for the transportation of perishable commodities in interstate commerce by railroad. (A. 22.)

Shortly after interposing its answer, respondent moved for summary judgment (A. 8), alleging immunity from liability under the Federal Employers' Liability Act as a matter of law, and the district court on March 18, 1966, granted the motion after concluding that Pacific Fruit Express Company is not a "common carrier by railroad." (A. 51-52.) Because judgment occurred in the infancy of this litigation, the record is of necessity fragmentary and is primarily

[1]This follows from respondent's Sixth Affirmative Defense (A. 6-7) alleging payment of temporary workmen's compensation benefits for which the employment relationship to injury would be a prerequisite to the application of California Labor Code § 3201 et seq. (industrial accident compensation).

concerned with facts showing the actual nature of respondent's operations.[2]

Pacific Fruit Express is "one of the oldest refrigerator car companies" in the United States.[3] It engages some four thousand employees (A. 41), most—if not all—of whom have joined railroad labor unions formed as "brotherhoods" with which P.F.E. has entered into collective bargaining agreements.[4] Respondent owns, controls, operates and services the largest

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[2]Verbatim extracts from the appendix set out in this brief to describe respondent's business activities come solely from documents authored by respondent unless specifically noted to the contrary. In fact, all data in the original record illustrating respondent's activities were obtained from the hand of respondent, i.e., its affidavit supporting the motion for summary judgment (A. 18-23) and the publications introduced below by petitioner (A. 37-50), the origin and authenticity of which are not disputed by respondent. The publications are informally obtained advertising literature but are nevertheless admissible in evidence against respondent (Rule 43(a), Federal Rules of Civil Procedure; California Evidence Code §§ 1220-1222, incorporating the provisions of former California Code of Civil Procedure § 1870(2)) and, having been introduced in the district court without objection, they constitute material which may properly be used against respondent.

[3]Since its organization in 1907, P.F.E.'s sole shareholders have been Union Pacific Railroad Company and Southern Pacific Company. (A. 18.) Respondent maintains that there are no joint managerial or labor force employees.

[4]Respondent so advised the district court in its affidavit filed in *Gaulden v. Southern Pacific Co.*, 78 F.Supp. 651 (N.D. Calif. 1948), aff'd 174 F.2d 1022 (9th Cir. 1949). See 2555 Records of the U.S. Court of Appeals, Number 12062, TR 34. Respondent still maintains the same labor arrangements and deals with a railroad clerical brotherhood of which petitioner was a member at the time of the accident. See the Motion and Brief on behalf of *Amici Curiae* Brotherhood of Railway Carmen of America, Brotherhood of Railway, Airline and Steamship Clerks etc., and the Switchmen's Union of North America for illustrations of the type of work done by P.F.E. employees represented by railroad Brotherhoods.

fleet of refrigerated railroad cars and trailers in the United States, consisting of twenty-five thousand three hundred refrigerator boxcars, 2730 mechanical cars, and 1000 "Ice-Tempco" cars[5] (A. 40) and constituting essentially thirty per cent of the refrigerated railroad rolling stock in the nation.[6] Respondent aptly describes itself as "the nation's largest operator of refrigerated rail cars." (A. 40.)

Rail deliveries of perishable commodities which require protection against heat and cold "were handled by railroads even as far back as 100 years ago" (A. 41) and do not represent a modern innovation in the railroad industry. An estimated one million railroad carloads of perishable commodities now move in the United States every year, and Pacific Fruit Express "originates and otherwise handles about 280,000 car-

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[5]"Ice-Tempco" refers to the presence in the freight cars of "units for constant operation of air-circulating fans while under load to produce controlled temperatures." (A. 46.) The continuous involvement of P.F.E. with the commodities while being transported is further illustrated by the fact that P.F.E. also advertises "TEMPCO-VAN SERVICE" involving ownership and use of 400 refrigerated highway trailer-containers for receipt and delivery of goods and 200 "piggyback" rail flat cars to carry the containers. (A. 37.)

[6]Respondent during the year 1965 also operated 1946 refrigerator cars and 474 flat cars leased from the Southern Pacific Company and 1742 refrigerator cars and 474 flat cars leased from the Union Pacific Railroad Company. Interstate Commerce Commission, Annual Reports, *Transport Statistics in the United States*, Part 9, p. 7 (for the year ending December 31, 1965) [hereinafter cited as I.C.C. Transport Statistics]. It is unknown whether these leased cars are reflected in the figures cited above as published by respondent or whether they represent an additional aspect of respondent's railway car operations. In any event, respondent operates rolling stock owned by operating rail carriers as well as its own cars.

loads or approximately 28% of the nation's total."[7] (A. 42.) Respondent is able "to handle all kinds of perishable foodstuffs and other commodities from and to every part of the country" (A. 42) as well as controlling the movement, direction and handling of cars in transit under what are termed its "Car Service Operations."[8] Pacific Fruit Express advises shippers that

> TEMPCO-VANS, the most modern trailers designed especially for combination highway and piggyback operation, are the latest addition to PFE's *first family of perishable transportation.*

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[7]In 1965 the Interstate Commerce Commission listed seven refrigerator car lines owned or controlled by American railroads. I.C.C. Transport Statistics, *supra* note 6. Using the figures provided therein, it appears that Pacific Fruit Express accounted for approximately 46% of the operating revenues, 52% of the mileage made by owned cars and 51% of the employees in the refrigerator car subdivision of the railroad industry. The record is silent regarding the organizational structure or actual operations of any of the six smaller refrigerated freight rail lines. It is known, however, that in at least one important particular P.F.E.'s transportation activities are considerably more extensive than those of Fruit Growers Express. F.G.E. is the second largest of the refrigerator rail companies owned or controlled by railroads, *id.*, but does *not* service its rolling stock. Rather it simply leases its cars while an independently contracted company ices and otherwise services the railroad cars. See *Hetman v. Fruit Growers Express Co.*, 346 F.2d 947 (3d Cir. 1965), which must therefore be distinguished from the present case.

[8]These consist "in large part of car distribution, the furnishing of commodity protective services as ordered by the shipper, and . . . diversion and passing service." (A. 48.) Car distribution "involves the provision of cars at proper places at the proper times" in condition to transport perishables. Diversion operations are explained as involving the rerouting of freight cars by respondent whenever the shipper calls P.F.E. to request a change in destination; passing service involves notification to the shipper by P.F.E. of the precise location of each car bearing the shipper's goods.

> Shippers and consignees want their shipments transported speedily and smoothly *and delivered to the market in top condition.*[9]

Respondent advertises, moreover, that it has "Offices and Agencies in all principal Western producing areas" and in "all major receiving and consuming areas." (A. 40.)

Respondent describes its own *en route* services in a manner most suggestive of a kinetic carriage activity as distinguished from a static and limited rental and ice service:

> [Refrigerator trailers and cars] are used for frozen foods as well as fresh fruits and vegetables and add to the many other features of PFE service the convenience of pick-up and delivery. (A. 47.)
>
> . . . [I]f after valuable produce is loaded into a car and it is started on its way to the consuming center, . . . it is learned that another area has better demand and offers a better price, the shipper will call us on the telephone and request that we "divert" the car from its originally billed destination to the new destination. . . . In handling some 285,000 carloads of perishables a year we are called upon by shippers to accomplish in the neighborhood of 170,000 diversions a year. . . . We have sizable diversion forces at Chicago . . . [which] are aware at all times where each and every loaded car may be and we keep shippers

[9] A. 37. Respondent itself has provided these italics in the original publication, thereby deliberately emphasizing the carriage of goods as opposed to the servicing of rail cars.

> informed when their shipments "pass" certain points. . . . (A. 49-50.)

In 1965 P.F.E.'s cars accounted for over one billion miles of railroad car movement in the United States.[10]

All of respondent's rolling stock illustrated in its brochures (*e.g.*, A. 37, 40, opposite 50), and also plainly visible to passersby on railroad or highways, clearly bears respondent's name, while the insignia of its owners appear in distinctly subordinate detail. The public, moreover, is exhorted to contact P.F.E. directly "for the finest in perishable transportation service throughout America" since respondent maintains "offices in principal cities to supply your needs fast—wherever you are." (A. 40.) Perhaps most revealing is the fact that P.F.E. facilitates direct contact with the consumer by holding itself out to the public in major cities across the United States as a carrier by railroad. A random sampling revealed that Pacific Fruit Express is listed—under its own corporate name—in the recent classified telephone directories of Minneapolis,[11] Omaha,[12] Sacramento,[13] and

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[10] I.C.C. Transport Statistics, *supra* note 6. By comparison, in 1962 the estimated total freight car-miles by all "Class I railroads" (traditional railroad corporations having annual operating revenues of $3 million or more, excluding terminal companies, switching roads, and small railroad companies) was approximately twenty-seven billion miles. U.S. Dept. of Commerce, *Statistical Abstract of the United States* (1963), No. 787, p. 579.

[11] p. 557 (November, 1966).

[12] p. 333 (1966).

[13] p. 576 (January, 1967). Petitioner's injuries were sustained at respondent's terminal located but a short distance from Sacramento, California.

San Francisco[14] under the index heading *"Railroad Companies"* and of Chicago,[15] Cincinnati,[16] Cleveland,[17] Denver,[18] Detroit,[19] Kansas City (Kansas and Missouri),[20] Pittsburgh,[21] Portland (Oregon),[22] Salt Lake City,[23] Seattle,[24] and Tucson[25] under the heading *"Railroads"*.

Pacific Fruit Express owns extensive terminal and service properties and facilities, none of which is or was wholly or partially owned by Southern Pacific or Union Pacific, respondent's owners. (A. 19.) Respondent maintains and operates five car shops at which railroad freight cars are built and repaired at various locations in the United States and has supplemental light repair and cleaning stations at a number of locations throughout the western states.[26] (A. 43.) Respondent operates eleven ice manufacturing plants nationally and also purchases ice from other

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[14]p. 761 (1966).

[15]p. 1650 (1966).

[16]p. 534 (June, 1966).

[17]p. 809 (April, 1966).

[18]p. 643 (July, 1966).

[19]p. 1164 (September, 1966).

[20]p. 620 (February, 1967).

[21]p. 636 (December, 1966).

[22]p. 629 (1966-1967).

[23]p. 356 (June, 1966). This, it should be noted, is respondent's state of incorporation.

[24]p. 584 (March, 1966).

[25]p. 319 (June, 1966).

[26]Common carriers by railroad, it appears, characteristically maintain and operate facilities for the construction and repair of their own stock. Cf. *Southern Pacific Co. v. Gileo*, 351 U.S. 493 (1955).

commercial concerns to meet its refrigeration demands. (A. 43.) *Deliveries of ice are made on railroad tracks owned by respondent, and repairs are accomplished by hauling cars over tracks owned by P.F.E. by means of locomotives also owned by respondent.* (A. 21-22.) Respondent is not only required to operate and maintain its own railroad equipment in compliance with the Federal Safety Appliance Act[27] but also undertakes to repair railroad equipment owned by other companies at P.F.E. maintenance facilities.[28]

Respondent's revenues are generated by charging rates varying from 4.5 to 5.25 cents per mile for the use of each of its railway cars.[29] (A. 19.) Respondent's primary fees, therefore, are regularly based not on the providing of refrigeration service to a particular company for a specified term, nor on the length of service of a railroad car, nor on the actual cost of providing the services, but directly on the distance of the carriage of goods.[30] Respondent "files financial data with

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[27]27 Stat. 531, 45 U.S.C. §1 et seq. This fact was found and reported by the California District Court of Appeal in *Pacific Fruit Express v. McColgan*, 67 Cal.App.2d 93, 97, 153 P.2d 607 (1944). That court also noted that maintenance and repair of respondent's railroad cars was accomplished both at its own facilities and, occasionally, at railroad repair shops owned by other companies. *Id.*

[28]See findings of facts by the district court in *Gaulden v. Southern Pacific Co., supra*, 78 F.Supp. 651, 654.

[29]*Id.* Respondent may on occasion lease a refrigerator car directly to a shipper on a monthly basis. (The rental rate would presumably not include income from special services in the icing or refrigeration of cars belonging to other companies or from the repair of cars of other carriers.)

[30]The fact that respondent customarily issues no bill of lading or statement of charges directly to the shipper but instead relies upon contracting carriers to collect and forward its revenues is

the Interstate Commerce Commission" which also prescribes the form of accounts to be used by respondent. (A. 20.) P.F.E.'s contracts are subject to approval by the I.C.C. before becoming operative,[31] thereby giving the Commission de facto regulatory authority over respondent's rates and services.[32] Conversely, Pacific Fruit Express "does not report to the California Public Utilities Commission, nor to any other state utilities commission." (A. 20.)

The district court believed that the Federal Employers' Liability Act does not embrace respondent's operations as reflected by the record herein. In its very brief opinion the Court of Appeals drew the following factual conclusions:

> P.F.E. is a large refrigerator car company. It owns approximately 25,000 refrigerator cars and carries about 28% of all refrigerated goods mov-

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immaterial to any of the issues in this action. See *Union Stockyard v. United States*, 308 U.S. 213 (1939), and *United States v. California*, 297 U.S. 175 (1936) where the operations in question were found to be common carriers by railroad notwithstanding the fact that *all* of their services and charges were rendered solely and directly to railroad companies and in no respect to the general public.

[31] *Gaulden v. Southern Pacific Co., supra.* The court also found that the contract with respondent's owners, approved by the I.C.C. in 1942, provided for indemnification by P.F.E. of its owners against liability for injury or damage to personnel or property of the owners while acting on behalf of P.F.E. and fixed responsibility of P.F.E. for damage to any freight as a result of any improper service on its part.

[32] Although direct Interstate Commerce Commission control over respondent's operations stems from the grant of authority in the Transportation Act of 1940, 54 Stat. 917, 49 U.S.C. § 20(6), the Commission was previously aware of the problems of refrigerator car rates and of its ability to regulate indirectly by directives to operating railroads. See Report of the Commission, 50 I.C.C. 652, 677 (1918), *In the Matter of Private Cars.*

> ing by rail. *P.F.E. deals directly with the shipper* and, among other activities, maintains a service by which it keeps the shipper posted as to the whereabouts of its goods in transit, thus allowing the shipper to order goods diverted from one destination to another. (A. 53-54, italics added.)

The court below, believing that "[w]ere the slate clean, we might well be convinced by [petitioner's] argument for a broader definition," elected nonetheless to revivify the strict construction applied originally by the district court in 1948 in *Gaulden v. Southern Pacific Company,* 78 F. Supp. 651 (N.D. Calif. 1948), aff'd without further opinion 174 F. 2d 1022 (9th Cir. 1949), the earliest decision to approach the question of Employers' Liability Act application to a railroad freight refrigeration company.

SUMMARY OF ARGUMENT

The Federal Employers' Liability Act must be construed liberally, especially when viewed in terms of modern pronouncements of this Court on the subject of common carriers by railroad. Moreover, liberal construction of the Act requires that Pacific Fruit Express factually be seen as a common carrier by railroad in view of the nature of the operations transpiring at its yards—the building, maintenance and repair of railroad freight cars, servicing rolling stock for the transportation of perishable commodities in interstate commerce, constant supervision of the nationwide movement of goods, and especially the

constant control over the movement and eventual destination of the goods in transit. Additionally, petitioner's position is supported by the long line of terminal company cases.

The only way to effectuate the broad regulatory program which Congress has established for the railroad industry is to bring all operations wholly within that industry under the Employers' Liability Act. Negligence on the part of Pacific Fruit Express impairs the safety of its railway employees, the public and the even flow of interstate commerce fully as much as misconduct by any railroad terminal operation or full service railroad carrier.

ARGUMENT

"Whether a transportation agency is a common carrier depends not upon its corporate character or declared purposes, but upon what it does." *United States v. California*, 297 U.S. 175, 181 (1936).

I. INTRODUCTION

The broad language and liberal history of the Federal Employers' Liability Act have been such that few modern cases before this Court have required a determination of whether or not the activities of a particular transportation company bring it

within the scope of the F.E.L.A.[33] This is such a case. The status of Pacific Fruit Express would seem to be determined by the broad prefatory language of *Parden v. Terminal R. of Alabama Docks Dept.*, 377 U.S. 184, 185 (1964),[34] since respondent herein possesses each of the general attributes making the Alabama terminal company "undisputedly a common carrier by railroad engaging in interstate commerce."[35] *Id.*

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[33]Although this Court has had occasion since World War II to examine particular activities of traditional operating railroads, *see, e.g., Southern Pacific Co. v. Gileo*, 351 U.S. 493 (1955), it appears that only in the area of terminal companies has this Court had to deal with inclusion of particular companies themselves within the F.E.L.A. *E.g., Parden v. Terminal R. of Alabama Docks Dept.*, 377 U.S. 184 (1964).

[34]"Consisting of about 50 miles of railroad tracks in the area adjacent to the State Docks at Mobile, it serves those docks and several industries situated in the vicinity, and also operates an interchange railroad with several privately owned railroad companies. It performs services for profit . . . . It conducts substantial operations in interstate commerce. It has contracts and working agreements with the various railroad brotherhoods . . . ; maintains its equipment in conformity with the Federal Safety Appliance Act . . . ; and complies with the reporting and bookkeeping requirements of the Interstate Commerce Commission."

[35]Owning and operating tracks, engines, terminals and the largest fleet of refrigerated freight cars in the United States (A. 21, 40), Pacific Fruit Express devotes its entire operation to the direct and indirect service of both shippers and carriers of perishable commodities. This includes movement of railroad cars for icing and repair operations (A. 22), construction and maintenance of refrigerator railroad cars (A. 47), directing the movement of its cars while carrying perishables in interstate commerce (A. 49), and providing all necessary service for the pick-up, movement and delivery of perishables. (A. 38-40.) P.F.E. has formal written contracts to render protective services to a number of railroads (A. 18), and deals with shippers and railroads on a nation-wide basis. (A. 40.) It performs services for profit (A. 21) and does not deny its involvement in interstate commerce. P.F.E. has contracts and working agreements with various railroad brotherhoods (n. 4, *supra*), maintains its equipment in conformity with the Federal Safety Appliance Act, 27 Stat. 531, 45 U.S.C. §1 et seq. (n. 27, *supra*), and complies with the reporting and bookkeeping requirements of the Interstate Commerce Commission. (A. 20.)

Nonetheless, the Court of Appeals elected to construe the central language of the F.E.L.A. "narrowly" while rejecting the "broader definition" urged by petitioner. (A. 54.) The Court of Appeals candidly admitted its belief that the more remedial solution would be appropriate "were the slate clean," but chose to adhere to a restrictive line of reasoning inappropriate to Employers' Liability Act cases. It is the position of petitioner that there can exist no justification for an exception to the broad construction traditionally applied to federal statutes in the protection of railroad workingmen.

The inference is inescapable from its brief opinion that the court below recognized the common carrier and railroad attributes of respondent and also observed the identity of railroad perils facing P.F.E.'s employees. Nevertheless, the Court of Appeals opted in favor of a judicial philosophy inimical to modern F.E.L.A. thinking.

II. PACIFIC FRUIT EXPRESS IS A COMMON CARRIER BY RAILROAD UNDER APPLICABLE MODERN GUIDELINES

In reaching its conclusion, the Court of Appeals rejected a distinguished line of cases both cogent and relevant in this discussion—the terminal company cases. A terminal company ordinarily prepares, services, supervises and occasionally operates railroad equipment between journeys and rarely acts upon the equipment while it is actually in use crossing state

lines.[36] As such these businesses provide a service to general service rail carriers, own little and sometimes no railroad track or equipment, and—most significantly—differ from respondent in that they exercise *no control* over the actual interstate management or carriage of goods. There does not seem to be any instance of a terminal company holding itself out to the general public by advertising or directory listing as a common carrier by railroad. Nevertheless, because of the intimate involvement of terminal companies in the fabric of interstate railroad commerce, they are included within the operation of the Interstate Commerce Act,[37] the Railway Labor Act,[38] the Hours of Service Act,[39] the Federal Safety Appliance Act,[40] and—most notably—the Federal Employers' Liability Act.[41] There is no modern authority excluding the terminal companies from the scope of any applicable federal railroad legislation.

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[36]See *Fort Street Union Depot Company v. Hillen*, 119 F.2d 307 (6th Cir. 1941); *McCullough v. Jacksonville Terminal Co.*, Fla.App., 176 So.2d 345 ((1965).

[37]34 Stat. 584, 49 U.S.C. §1; *Union Stockyards v. United States*, 308 U.S. 213 (1939).

[38]48 Stat. 1185, 45 U.S.C. §151; *California v. Taylor*, 353 U.S. 553 (1957).

[39]34 Stat. 1415, 49 U.S.C. §61; *United States v. Brooklyn Eastern District Terminal Co.*, 249 U.S. 296 (1919); *Bush v. Brooklyn Eastern District Terminal Co.*, 218 N.Y.S. 516, 218 App.Div. 782 (1926).

[40]27 Stat. 531, 45 U.S.C. §1; *United States v. California*, 297 U.S. 175 (1936).

[41]*Parden v. Terminal R. of Alabama Docks Dept.*, 377 U.S. 184 (1965); *Fort Street Union Depot Company v. Hillen*, 119 F.2d 307 (6th Cir. 1941); *Maurice v. California*, 43 Cal.App.2d 270, 110 P.2d 796 (1941); *McCabe v. Boston Terminal Co.*, 303 Mass. 450, 22 N.E.2d 33 (1939), reversed on other grounds, 309 U.S. 624 (1940).

It therefore becomes of great significance that Pacific Fruit Express is required to comply with the Safety Appliance Act,[42] and is also included in the Railway Labor Act,[43] the Railroad Retirement Act,[44] and the Railroad Unemployment Insurance Act.[45] Consistency in the application of the broad regulatory policy of Congress requires that Pacific Fruit Express be included within the F.E.L.A.

> The language of the FELA is at least as broad and all-embracing as that of the Safety Appliance Act or the Railroad Labor Act, . . . If Congress made the judgment that, in view of the dangers of railroad work and the difficulty of recovering for personal injuries under existing rules, railroad workers in interstate commerce should be provided with the right of action cre-

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[42] n. 27, *supra*.

[43] 45 U.S.C. §151: "First. The term 'carrier' includes any express company, sleeping-car company, carrier by railroad, subject to the Interstate Commerce Act, and any company which is directly or indirectly owned or controlled by or under common control by any carrier by railroad and which . . . performs any service in connection with . . . refrigeration or icing. . . ."

[44] 45 U.S.C. §228: "(a) The term 'employer' means any carrier (as defined in subsection (m) of this section), and any company which is directly or indirectly owned or controlled by one or more such carriers or under common control therewith, and which operates any equipment or facilities or performs any service . . . in connection with . . . refrigeration or icing.

"(m) The term 'carrier' means an express company, sleeping-car company, or carrier by railroad, subject to Part I of the Interstate Commerce Act."

[45] 45 U.S.C. §351: "(a) The term 'employer' means any carrier (as defined in subsection (b) of this section), and any company which is directly or indirectly owned or controlled by one or more such carriers or under common control therewith, and which operates any equipment or facility or performs any service . . . in connection with . . . refrigeration or icing. . . .

"(b) The term 'carrier' means an express company, sleeping car company, or carrier by railroad, subject to Part I of the Interstate Commerce Act."

> ated by the FELA, we should not presume to say, in the absence of express provisions to the contrary, that it intended to exclude a particular group of such workers from the benefits conferred by the Act. *Parden v. Terminal R. of Alabama Docks Dept.*, 377 U.S. at 189-190 (1964).

Congress enacted broad protection for the workingman against the perils of interstate rail commerce. It is the "danger to be apprehended" that invokes the shield of federal legislation, and it is immaterial from what segment of the railroad industry the peril may emanate. *United States v. California,* 297 U.S. 175, 185 (1936). This Court long ago determined that Congress intended to utilize the maximum reach of its authority to protect the railroad working force in interstate commerce "no matter what the source of the dangers which threaten it." *Mondou v. New York, N. H. & H. R. Co.,* 223 U.S. 1, 51 (1912) (the Second F.E.L.A. Cases).

Even a cursory review of the record in this case establishes that the dangers of railroad work, the difficulties of recovering adequate compensation for railroad-associated injuries, the threat of injury to interstate commerce and persons engaged in furthering commerce are all present in respondent's operations.

III. THE COURT OF APPEALS ERRED IN ITS RELIANCE UPON GAULDEN v. SOUTHERN PACIFIC CO.

Petitioner is mindful of the fact that Pacific Fruit Express has been involved in earlier F.E.L.A. litigation on three previous occasions, in each instance as a co-defendant with one of its owners.[46] In contrast to other litigation involving respondent, however, petitioner herein has not joined either of respondent's owners in this action. Nor has petitioner attempted to impute the operations of respondent's owners to respondent itself. Because there has not been a single reported case involving a personal injury action against P.F.E. which did not also include one or both of its owners as parties defendant, every such prior F.E.L.A. action has suffered from the infusion of questions of agency, contract, employment or joint enterprise. These analyses shared a common weakness: they engaged in a search for *the* railroad—as between respondent or its owners—as if there were some convincing force in the bare fact that respondent commonly works *with* railroad companies.[47] The

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[46] *Gaulden v. Southern Pacific Co.*, 78 F.Supp. 651 (N.D. Calif. 1948), aff'd without opinion 174 F.2d 1022 (9th Cir. 1949); *Moleton v. Union Pacific Railroad*, 118 Ut. 107, 219 P.2d 1080 (1950), cert. den. 340 U.S. 932 (1951); *Aguirre v. Southern Pacific Co.*, 232 Cal.App.2d 636, 43 Cal.Rptr. 73 (1964). *Moleton* and *Aguirre* both rest upon *Gaulden* and the cases cited therein. The court in *Aguirre* noted that the facts in all three cases were substantially the same. 232 Cal.App.2d at 645, 649. Accordingly the following discussion deals with *Gaulden* as the seminal decision but should be read as applicable equally to the other cases.

[47] "True, the service is performed by the Terminal under contracts with the railroad companies as agent for them, and not on its own account. But a common carrier does not cease to be such merely because the services which it renders to the public

plaintiff in *Gaulden v. Southern Pacific Co.*, 78 F. Supp. 651 (N.D. Calif. 1948), made no real effort to show that P.F.E. in its own right is a common carrier by railroad.[48] It is plain that the questions presented for decision in *Gaulden* were removed from any valid interpretation of the F.E.L.A. by the intervention of contract and agency issues. *Gaulden* in reality can stand only for the limited proposition that the *contract* between Southern Pacific and Pacific Fruit Express did not expose respondent's owners to F.E.L.A. liability for injuries to respondent's employees on the basis of agency, joint enterprise or fraud theories. Insofar as that decision might purport to go farther,

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are performed as agent for another. The relation of connecting carriers with the initial carrier is frequently that of agent. [Citation omitted.] The relation of agency may preclude contractual obligations to the shippers, but it cannot change the obligations of the carrier concerning the physical operation of the railroad under the Hours of Service Act, which, as this court has said, must be liberally construed to secure the safety of employees and the public." *United States v. Brooklyn Eastern District Terminal*, 249 U.S. 296, 306-307 (1919).

[48] *Gaulden* was based essentially on the argument that P.F.E. was an agent of Southern Pacific, that Southern Pacific and P.F.E. were a joint enterprise—making the plaintiff an employee of S.P., that the contract between S.P. and P.F.E. violated Section 5 of the F.E.L.A. as an attempt to evade liability by device, and that the 1939 amendment to the F.E.L.A. "being remedial and humanitarian in purpose, the courts should construe the intent of Congress to include the appellee . . . as a 'Common Carrier by Railroad. . . .'" Brief for Appellant [Gaulden], 7-8, 2555 Records of the U.S. Circuit Court of Appeals, Number 12062. The entirety of the appellant's argument on the last point consisted of one paragraph, without any supporting authority, to the effect that the amendments in question should cause the courts to "construe liberally the phrase 'common carrier by railroad' so as to include refrigeration car service." *Id.* at 18.

The District Court's treatment of this last argument was confined to a comment that these "remedial and humanitarian purposes . . . in no way compel an interpretation of the *contract* in favor of an *employment or agency relationship*" between S.P. and P.F.E. 78 F.Supp. at 654, 656-657 (italics added).

it cannot be viewed as reliable authority since neither sufficient facts nor proper legal authorities were before the courts at that time. Yet the Court of Appeals in the instant matter, fully apprised of the defects in *Gaulden* and the succeeding decisions based thereon, elected to resurrect the earlier decision.

In addition to this fundamental postural distinction between *Gaulden* and the instant case, significant factual differences now appear in the very operations of P.F.E., further demonstrating the common carrier nature of respondent's business. The *Gaulden* opinion described respondent in the following terms:

> The shippers specify to the carrier, in writing, the type of service desired; they may, by written order, change the type of service originally requested. . . . The shipper's orders are transmitted by the carrier to the Pacific Fruit Express Company . . . [which] transacts none of its protective service business directly with the shippers. 78 F. Supp. at 654.

The brochure "NOW—PFE Goes Piggyback!" (A. 37-40) makes it amply apparent that respondent in fact deals directly with the shipping public. Moreover, the fact that respondent holds itself out in telephone directories throughout the nation as a common carrier by railroad negates this early finding by the *Gaulden* court. The Court of Appeals specifically recognized this major change in the available facts regarding respondent's operations when it noted that "P.F.E. deals directly with the shipper". (A. 54.)

Essentially the *Gaulden* case—and therefore the decision of the court below—rests upon the early

obiter dictum of *Wells Fargo v. Taylor,* 254 U.S. 175, 187 (1920), defining a common carrier by railroad as "one who operates a railroad as a means of carrying for the public,—that is to say, a railroad company acting as a common carrier." Such a narrow definition is no longer appropriate to F.E.L.A. litigation—if ever it was. The early tendency to narrow and dilute the F.E.L.A. which occupied much of the judicial literature during the first two decades following its enactment has been abandoned. The clear and explicit Congressional mandate for broad application has been recognized in almost every area of the railroad industry save the one presently before this Court. The *Wells Fargo* decision can no longer be credited with any vitality in measuring the coverage of the F.E.L.A. It represents only a gratuitous finding that the express company was not *the* common carrier by railroad involved in that case. It is noteworthy that express companies have subsequently been recognized and classified as common carriers, and any exclusion of the application of the Employers' Liability Act arises from their lack of railroad appliances and facilities rather than from any shortage of transportation activities in interstate commerce; they are common carriers by means other than railroad.[49]

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[49] "The expression 'by railroad' in the federal statute is but descriptive of the kind of common carrier to which the statute relates, distinguishing railroads from common carriers of other kinds to which the act does not extend, and . . . , by the statute, it was not attempted or intended to define the kind of instrumentalities used on which their liability for negligence should exist or by which it should be limited. . . . [Citing Second Employers' Liability Cases, 223 U.S. 1.]" *Hamarstrom v. Missouri-Kansas-Texas R. Co.,* 233 Mo.App. 1103, 116 S.W.2d 280, 286 (1938).

Fleming v. Railway Express Agency, 161 F. 2d 659 (7th Cir. 1947); *Jones v. New York Central,* 182 F. 2d 326 (6th Cir. 1950); *Railway Express Agency v. Esformes,* 174 N.Y.S. 2d 878, 12 Misc. 2d 1038 (1958).

In *Fleming v. Railway Express Agency, supra,* 161 F. 2d at 661, the court had no hesitation in holding that

> a common carrier is one who, for hire, engages in transporting commodities from one place to another, or in connection with another carrier, such as a railroad. It does not step outside its common carrier status because it only renders part, though a necessary part, of a transportation service, or because it renders its service as an agent of a common carrier.

Even if respondent acts in part through other companies, that does not alter the fact that P.F.E. is a common carrier by railroad.[50]

IV. THE COURT OF APPEALS IGNORED THE REMEDIAL INTENT OF THE F.E.L.A.

The court below has resurrected a barrier to the broad uniform application of the remedial legislative system governing the interstate transportation of commodities by rail. This totally ignored the expansion of the F.E.L.A. which has kept pace with the

[50]See, for example, *Eddings v. Collins Pine Company,* 140 F. Supp. 622 (N.D. Calif. 1956). This well-reasoned opinion found a lumber company which wholly owned and controlled a small railroad corporation to be a common carrier by railroad even though the lumber company was not organized as a railroad carrier under traditional lines.

growth of remedial federal legislation generally, and in particular with the maritime sector. The courts have methodically avoided highly technical or artificial distinctions and have sought basic practical answers to the problems in defining the borders of these industries.[51] For example, in distinguishing between the application of the F.E.L.A. and the Longshoremen & Harbor Workers' Compensation Act, 44 Stat. 1424, 33 U.S.C.A. §901 et seq., the courts simply look to determine what the primary duties of the employee are; if the primary duty is railroading, then the F.E.L.A. applies, while if more maritime or longshoreman in nature the other statute controls.[52] Certainly the same type of test if applied to the instant matter brings petitioner within the F.E.L.A. rather than any state administrative remedy. Petitioner was employed in a railroad yard where movement of rail cars was ocurring, where car maintenance, loading and unloading were taking place, where the interstate transportation of perishable commodities by rail was being effectuated. This is railroading work. The decision of the court below cannot be explained in terms of any of the principles heretofore enunciated in the construction of the F.E.L.A. and should not be permitted to foreclose litigants such as petitioner from securing the federal remedy designed for the perils of the industry in which they work.

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[51]Compare, for example, *Southern Pacific v. Gileo*, 351 U.S. 493 (1955), and *Reed v. Pennsylvania R. Co.*, 351 U.S. 502 (1955), with *Guiterrez v. Waterman Steamship Corp.*, 373 U.S. 206 (1963).

[52]See discussion and cases cited in Richter and Forer, *Federal Employers' Liability Act*, 12 F.R.D. 13, 26-27.

CONCLUSION

Pacific Fruit Express Company has labored mightily to create for itself a treasured immunity from liability under the F.E.L.A. Nor on the other hand is it presently subject to uniform state regulation, for it does not report to the California Public Utilities Commission or to any other state utilities commission.[53] (A. 20.) It now enjoys the incredible luxury of escaping responsibility under any comprehensive regulation or uniform liability system.[54] The time has come for a realistic appraisal of respondent's operations. If the Employers' Liability Act is still to be construed liberally to effectuate its beneficial purposes,[55] respondent's employees must be given the protection of that Act. Moreover, if the remedial and protective aspects of the

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[53]California Public Utilities Code § 202 excuses from the operation of that Code enterprises in interstate commerce. Were it not for this exemption, it appears that P.F.E. would be a common carrier by rail under applicable California statutes. Pub. Util. Code § 229 includes all tracks, depots, yards, grounds, terminals and terminal facilities, and all other equipment used in rail transportation within the term "railroad"; § 230 defines a "railroad corporation" as every corporation which owns, controls, operates or manages any railroad in the state; § 211 declares every such railroad corporation to be a common carrier. Compare Arizona Constitution, Art. 15, § 10; Idaho Code Annotated §§ 61-113, 61-107; Montana Revised Code Anno. §§ 72:114, 72:115; Nevada Revised Statutes § 704.020; Oregon Revised Statutes § 760:010, all to the same general effect as the parallel California law.

[54]Notwithstanding respondent's protestations to the contrary, it appears that the Interstate Commerce Commission can, if it desires, exercise effective control over respondent's rates and general services. See 50 I.C.C. 652, 677 (1918); 253 I.C.C. 21 (1942); 318 I.C.C. 111 (1962). There is absolutely no corollary control over its safety practices or liability for damages, however.

[55]*Lilly v. Grand Trunk Western Railroad*, 317 U.S. 481 (1943); *Jamison v. Encarnacion*, 281 U.S. 635 (1930).

Federal Safety Appliance Act and similar remedial railroad legislation are to be effectuated through the F.E.L.A.,[56] how is P.F.E. to be required to bear its responsibilities as "the nation's largest operator of refrigerated rail cars" if its employees receive no assistance under the F.E.L.A.? To exempt respondent is to remove the only effective means of enforcing such statutes against Pacific Fruit Express and similar operations included within the other regulatory federal railroad statutes.

Before the courts, Pacific Fruit Express Company carefully seeks to create an image divorced as far as imaginable from the carriage of goods by rail. But when viewed practically, P.F.E. cannot escape the fact that its every action represents a direct venture in that industry alone. Perhaps the most eloquent argument to this effect was made almost thirty years ago, not in the published records of any court proceeding, but in the pages of one of the nation's most widely read periodicals, Business Week Magazine. In its December 9, 1939, issue, Pacific Fruit Express was quite simply and directly described in terms suitable only to an enterprise solely and entirely involved in transporting America's perishable commodities from grower to market by railroad. This article is reprinted herein as Appendix A to illustrate most vividly the fact that a company which acts and appears so like a rail carrier must be in fact and in law a common

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[56] *Urie v. Thompson*, 337 U.S. 163 (1949).

carrier by railroad under the Federal Employers' Liability Act.

Because the decision of the court below departs so radically from the established interpretation of the F.E.L.A. and the uniform application of this Act, it is respectfully submitted that the decision of the Court of Appeals should be reversed.

Dated, San Francisco, California,
November 27, 1967.

Respectfully submitted,
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(Appendix A Follows)

Snaking their way across the country to an undesignated destination, approximately 67 of the 99 cars on this Pacific Fruit Express—according to past performances—will be diverted en route. The P. F. E. handles many perishables without any definite delivery point, informs shippers by telegraph of the location of their cars. Shippers study the markets, decide where to deliver produce while the train is en route. Of the 38,000 cars handled annually by P. F. E., about 23,000 are thus diverted.

under the Interstate Commerce Act. In other words, should these overriding or indirect carriers be entitled to the same regulation as a direct carrier? (The ICC has repeatedly urged regulation of freight forwarders; under the present act it administers, however, it feels that there is no provision for them). And pending the court's decision in the case, the ICC is holding its Acme order in abeyance until Jan. 10.

If the ICC can make its order stick, forbidding the filing of tariffs, the ruling will mean that forwarders may lose much of their present competitive advantage. No longer will truck common carriers be permitted to make concurrences (agreements) with them concerning rates.

ICC Fights Chicago Decision

But the forwarders have an ace up their sleeves, in the form of a Chicago federal court decision. This decision outlawed an ICC ruling which forbade truck common carriers from granting forwarders proportional rates. Some forwarders feel that if this decision holds water, substitution of proportional rate arrangements will in time counteract the loss of concurrences—if the latter are eventually outlawed. Meanwhile, however, the ICC intends to battle the Chicago court's decision right up to the Supreme Court.

The fuss over forwarders will be further accentuated next month when a Senate interstate commerce committee investigation is expected to come up. At that time, too, the joint report on the transportation bill held over from the last session of Congress (*BW—Aug5'39, p16*) will be reported out of committee. Forwarders hope that in the bill that finally emerges a provision will appear placing them under ICC supervision. At present, only the House version of the bill does this. That would solve most of the forwarder problem. Until then, however, a very good fight is in view.

Growers' Life Line

Pacific Fruit Express Co. in spotlight with $10,000,000 program of refrigerator car repair.

TRANSPORTATION to eastern markets is the life line of the large-scale fruit and vegetable industry of the west. Because of this, announcement by Pacific Fruit Express Co. last week that $10,000,000 would be spent for rebuilding and repairing refrigerator cars during the first six months of 1940 was big news to interests allied with production and distribution of perishables.

Some 2,300 cars have been rebuilt so far this year by P.F.E. By July, 1940, another 2,500 will be readied for the seasonal rush peak. The company has spent something like $21,000,000 for 5,700 new refrigerator cars in the last 10 years and is now building 25 socalled super-giant cars (nothing new, but just jumbo-size cars) at a cost of $150,000.

Rebuilding a refrigerator car means replacement of the box part with an entirely new superstructure. The only parts of the original car that go into the rebuilt unit are the underframes and trucks.

Last week the P.F.E., usually very reticent about its operations, revealed a few colorful items of information. It now claims to be the world's largest operator of refrigerator cars, with 33 years of experience in hauling the west's perishables to market. It was organized jointly by the Southern Pacific and Union Pacific in 1906 with 6,600 cars and an office force of three persons. It now has more than 3,000 employees in peak seasons; owns 17 manufacturing and two natural ice plants, and has icing platforms to handle 3,738 cars simultaneously.

Under P.F.E. schedules, refrigerator cars loaded with perishables during the day are moved to established concentration points. From these, trains begin to move eastward every morning at 3 A.M. for guaranteed arrival in Chicago on the morning of the seventh day. The schedule allows a leeway of 16 hours so that cars delayed in reaching concentration yards will be hauled into Chicago early on the seventh morning.

Maneuvering for Markets

Model railroad fans who like to shunt freight cars around a complicated system of miniature tracks might ponder this:

The P.F.E. schedule permits shippers to change their minds about destination while the train is en route and to divert their produce to the most favorable market. Many perishables are handled by P.F.E. without a definite delivery point.

Shipper and consignee are kept informed by telegraph of the location of their particular cars and while the train rolls eastward, the shipper studies markets and makes up his mind where his produce is to be delivered. Of the 38,000 cars handled annually by P.F.E., about 23,000 are diverted en route—6,000 of them twice, 3,000 three times.